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1	We got some documents. We didn't get some documents.		1	authenticity that you have not created them for purposes of	
2	I don't know. There are some documents that the government		2	this trial. That's appreciated.	
3	believes it's seeing for the first time, period.		3	The Bloomberg chats are coming from where? PPI's	
4	THE COURT: Is there a category of materials that		4	records?	
5	you're seeing for the first time? For example, the Bloomberg		5	MR. FINZI: Yes, your Honor.	
6	chats or something else? Are there individual documents that		6	THE COURT: And these are the same records for which	
7	just look new to you?		7	there was some pushback from PPI or its counsel about	
8	MS. GRISWOLD: I don't know that it's one specific		8	producing? Not to you perhaps. Maybe just to the government.	
9	category. One example is Defense Exhibit 5083. Most of them I		9	MS. GRISWOLD: Yes, your Honor. I think Mr. Naftalis	
10	didn't get in hard copy. I got on the screen. So I was just		10	had addressed that there had been a point at which we were -- a	
11	taking notes of them. I think it's not the texts but some of		11	resolution was made that we will take in a certain first batch	
12	the Bloomberg are emails.		12	of documents.	
13	Some of the stuff that went to investors, Ms. Pyun and		13	Then when we went back, there was a discussion about	
14	I were just trying to figure out over lunch. We could go over		14	resources and some resistance to producing the rest. I don't	
15	one by one what was provided today. If it's helpful to		15	know how much we want to retread that.	
16	your Honor, we could tell your Honor which ones are new to us		16	THE COURT: I don't want to retread that.	
17	or not.		17	There has now been a representation from Mr. Finzi on	
18	I don't think I could do much better than giving you		18	behalf of Mr. Ahuja that these documents are authentic, and	
19	DX5083 as an example and say that they fall into a couple of		19	he's given you certain sources where they come from.	
20	different categories, but we're not concerned about Mr. Dole's		20	Do you need something else right now?	
21	texts.		21	MS. GRISWOLD: Not right now, your Honor. I would	
22	THE COURT: But what you are concerned with are some		22	like to reflect on it this evening. It is new to have a	
23	of the investor communications.		23	situation -- to have this situation. I'm not asking for any	
24	Yes?		24	other relief right now. I want to consider whether I want to	
25	MS. GRISWOLD: Some of the investor communications and		25	come before the Court with another request.	
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1	some of the Bloomberg communications. To be clear, I'm not		1	THE COURT: At the moment, I have nothing else on my	
2	trying to suggest that any of these are not authentic. I just		2	plate right now with respect to that.	
3	don't know where they came from. So I'm just trying to figure		3	Mr. Ruzumna, I believe it's time to talk about your	
4	out if there is some practical way, give where we are, to get		4	motion, and I want to give you some preliminary observations,	
5	some representation so we can move forward. Again, I'm not		5	and then you and everyone here who wishes to can speak to these	
6	objecting to these documents.		6	issues.	
7	THE COURT: Mr. Finzi? Sir, the investor		7	Sir, I am making a distinction between requiring the	
8	communications, where are they coming from?		8	government to check its records and to see whether there are	
9	MR. FINZI: They are coming from, I believe -- and a		9	communications with counsel that might merit production under	
10	little bit of knowledge is dangerous here. So I should		10	Triumph Capital or general principles of impeachment or Giglio	
11	probably pass this off to somebody who knows better.		11	or 3500 material and whether those documents can actually be	
12	But I believe they're coming from one of two places,		12	introduced at trial.	
13	either PPI's records or investors that we've subpoenaed or that		13	Do you understand the difference?	
14	the government subpoenaed.		14	MR. RUZUMNA: I believe so, your Honor.	
15	THE COURT: All right.		15	THE COURT: Is it your view, sir, that any	
16	MR. FINZI: Then presumably they might have seen them		16	communications that counsel for the government might have with	
17	before.		17	counsel for a particular cooperating witness about their	
18	THE COURT: That was my point.		18	allocation would be improper?	
19	But you're leaving open the possibility that these may		19	MR. RUZUMNA: Would be improper? No. Of course not.	
20	be things that the government has seen and they're just		20	THE COURT: Let me follow on that. This is something	
21	mistaken?		21	where you and I might part company, but that's fine.	
22	MR. FINZI: No. I think it's also stuff that they		22	It seems to me that the government can speak with	
23	haven't seen, but it wouldn't be the first trial that they see		23	defense counsel, with cooperators' counsel, about a possible	
24	things on cross that they haven't seen before.		24	allocation. Requesting an allocation I don't believe is,	
25	THE COURT: No, but they just want to know for		25	per se, improper. I don't think you do as well. Requesting	

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1	discussions about an allocution I don't think is, per se,		1	proposed allocution with his client before sending it to the	
2	improper. Although it might be under certain circumstances.		2	government for review because, of course, one would want to	
3	And for me, the issue is perhaps not so much whether		3	know that one's client was on board with the statement that	
4	there is a distinction between the proposed allocution and what		4	you, as their agent, are suggesting that they make.	
5	actually gets said in front of a judge but whether or not what		5	THE COURT: Yes.	
6	actually gets said in front of a judge can be tethered at all		6	MR. RUZUMNA: Mr. Rosenberg, who is Mr. Majidi's	
7	or traced at all to the statements that were made in prior		7	counsel, said he did not have a specific recollection, but he	
8	proffer sessions with the government.		8	has not done anything to refresh himself on it and would like	
9	So your point is well taken, which is that it is		9	that opportunity. I assume that he would have a similar	
10	troubling to you that a proposed allocution went to the		10	practice because I think that is common practice among defense	
11	government that contained no references to your client. And		11	lawyers.	
12	then when it came time for the allocution, something else was		12	THE COURT: You would use it yourself, sir. Yes?	
13	said. I appreciate the concern.		13	MR. RUZUMNA: I would absolutely do it. I don't	
14	I'm not sure whether the fact of a change is itself		14	think, frankly, it would be consistent with my ethical	
15	either indicative of government misconduct or indicative of		15	obligations to commit to something of the import of a plea	
16	Giglio material for the declarant, for the cooperating witness.		16	allocution without clearing it by my client.	
17	Let me, please, continue.		17	THE COURT: All right.	
18	I have a competing issue which is that of the		18	MR. RUZUMNA: If I can, your Honor.	
19	attorney-client privilege that I presume would adhere in any		19	THE COURT: You may, sir.	
20	communications between the cooperating witness and his or her		20	MR. RUZUMNA: I think there are two issues. I would	
21	counsel.		21	suggest, your Honor, that the changes from the initial proposed	
22	So where I was coming to in terms of a position from		22	allocution to the final allocution as delivered is more than	
23	which we could have discussions is that if it turns out that		23	just the addition of the identity of my client.	
24	the witness was aware of this proposed allocution and		24	What we see in both of these allocutions is changes in	
25	understood that it was there, said something to the government		25	terms of the actual conduct by the individual who is	
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1	and then said something else, there might be some concern.		1	allocuting, both with Mr. Majidi in terms of what he did, how	
2	There might be some fodder for cross-examination.		2	he acted, and how he acted specifically to my client. And with	
3	If the witness, the cooperating witness, is unaware		3	Mr. Dinucci and Mr. Majidi, there are changes in the time	
4	entirely of the allocution, the proposed allocution -- excuse		4	frame.	
5	me -- and has had no discussions with counsel about it, my		5	As your Honor knows, our view of this case is very	
6	concern is that we're going to start getting into privileged		6	different from the government's. The government has charged a	
7	communications.		7	conspiracy from in or about January 2014, before my client even	
8	So from my perspective, what I'd like to know --		8	arrived at Premium Point, all the way through some point in	
9	perhaps the government can proffer on this issue -- is how it		9	2016.	
10	is we got from the proposed allocution to the final allocution.		10	We have said that this mismarking scheme, if you'll	
11	MR. RUZUMNA: I think I can address that in part,		11	call it that, really is not present in 2014 or even the	
12	your Honor, based on some materials that were produced to us as		12	majority or much of 2015. And when there were issues in 2015,	
13	3500 materials I believe last night.		13	the second half or late 2015, Mr. Shor did not join in those.	
14	THE COURT: And these are not the materials that were		14	He pushed back and took the actions that he had discussed.	
15	attached as exhibits to your letter, sir?		15	So the timing is critical. The government knew that	
16	MR. RUZUMNA: No.		16	timing because we had made presentations. Mr. Shor had	
17	THE COURT: Okay.		17	proffered. We made very clear the type of defense that we	
18	MR. RUZUMNA: The government produced handwritten		18	would be offering.	
19	notes from the conversation that was had over the weekend with		19	And that's why, when we discussed before trial whether	
20	Mr. Majidi's counsel and Mr. Dinucci's counsel. Of course,		20	there was a likelihood of Mr. Shor's proffer statements coming	
21	those are the two cooperating witnesses for whom we are		21	out, I said probably not, because we are going to be	
22	discussing their plea allocutions.		22	100 percent consistent.	
23	Neither attorney has a specific recollection of		23	So the changes in the allocutions remove references to	
24	discussing the proposed allocution with their client. However,		24	this alleged misconduct by the two allocutors being in late	
25	Mr. Dinucci's counsel said that it is his practice to review a		25	2015 or 2015 and '16. And it drags the relevant conduct back	

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1	to 2014 in a way that is consistent with the government's case		1	I can start with that.	
2	and inconsistent with ours.		2	The call with Mr. Rosenberg was with me, and I'll just	
3	What strikes me, your Honor, is that there is not just		3	give the full color of the call. I was sitting in my office.	
4	the addition of a name or the removal of a name that happens to		4	I got a call from Mr. Rosenberg. He appeared to be in a car.	
5	be my client's. It is tailoring, transforming, evidence in a		5	He said, hey, max. I got a call, a request from	
6	way that if defense counsel had done that with his witness or		6	Mr. Shor's lawyer, Dan Ruzumna. I think he said something like	
7	others, I suggest, your Honor, there would be accusations of		7	he asked if I would accept service of a subpoena. He wants to	
8	witness tampering, obstruction.		8	ask me about any discussion I had about an allocation. I don't	
9	So this is the kind of thing that causes me great		9	remember, but having tried to refresh myself.	
10	concern because we have been subject to changes in allocutions		10	And then he said, I'm away for the weekend.	
11	that, as proposed, would be very helpful to us, would have		11	I said, have a great weekend. I did not speak on the	
12	likely been delivered, if Mr. Dinucci's counsel is right that		12	call except to say, have a great weekend.	
13	he had gone over it and if Mr. Rosenberg says about Mr. Majidi,		13	I don't recall him saying anything along the lines of	
14	as I suspect he will, I would have cleared this with him, and		14	what Mr. Ruzumna said in terms of his looking for an	
15	it changed something else.		15	opportunity to refresh myself. He did say, I haven't refreshed	
16	We'd like to ask the witnesses about this. I don't		16	myself. I'm in the country for the weekend. That was the	
17	know if they'll remember, and that's why we'd like to ask their		17	call.	
18	lawyers if they don't. Or maybe we could come up with a		18	THE COURT: Did you understand or did you suggest to	
19	creative way of doing something to show the differences.		19	him that when his weekend fun was over that he might consider	
20	The second point, your Honor, is not only that first		20	looking back on his notes to try and refresh himself?	
21	big bucket that I mentioned, but the second point goes back to		21	In other words, were you contemplating a second call	
22	an issue that we seem to keep having, and that is these drafts		22	from him when he got back from the country?	
23	would not have been turned over but for subpoenas issued by the		23	MR. NICHOLAS: Your Honor, since I was hearing about	
24	defense and your Honor saying, I know you've gone back and		24	it for the first time, I did not want to engage substantively	
25	reviewed your files, but do it again and again and again.		25	with him on it at all. I don't know if he's a contemplated	
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1	And one would think when you dig at the bottom of the		1	witness now in some way. I don't think that would be	
2	barrel, at some point, you're going to hit the bottom. But we		2	appropriate.	
3	keep getting more, and it's not just a couple of random things.		3	I was simply in listening mode. I certainly think it	
4	It happens to be substantive, in this case, Giglio/Brady stuff.		4	would be natural for him to try to refresh himself. I'm not	
5	So those are my two concerns, the first one		5	suggesting otherwise, but the call was I was asked by	
6	substantively. The second one is why didn't we get this.		6	Mr. Ruzumna if I would accept service of the subpoena. I said	
7	THE COURT: Why don't I hear from someone,		7	yes.	
8	Mr. Nicholas.		8	He once asked me about any conversations I had about	
9	MR. NICHOLAS: Thank you, your Honor. I can speak.		9	the allocation. I don't have a memory about having tried to	
10	THE COURT: There is a lot to speak to, sir. So be		10	refresh myself. I'm in the country. So that was that call.	
11	very careful in responding, please. Thank you.		11	THE COURT: All right.	
12	MR. NICHOLAS: Yes. Of course, your Honor. Yes.		12	MR. NICHOLAS: I was also on the call with AUSA	
13	I didn't know if by that comment your Honor meant that		13	Griswold and counsel for Mr. Dinucci.	
14	the Court was going to prompt me.		14	THE COURT: Remind me again who counsel for	
15	THE COURT: No. But now I will.		15	Mr. Dinucci is.	
16	MR. NICHOLAS: Sure.		16	MR. NICHOLAS: Dan Zinman from Richards Kibbe & Orbe.	
17	THE COURT: I've begun to lay out the way I've been		17	THE COURT: Thank you.	
18	thinking about these issues. Mr. Ruzumna has asked me to focus		18	MR. NICHOLAS: Your Honor, on that call, Mr. Zinman	
19	slightly differently than I have been focusing and has proposed		19	said that he did not have a specific recollection with respect	
20	the two points of concern that he has. I want to hear from you		20	to conversations he had about Mr. Dinucci's allocation but --	
21	on those.		21	I'm not quoting from my notes. I don't have the notes in front	
22	I suppose I want to hear from you as well regarding		22	of me, but I believe he said, as a general practice matter, he	
23	the notes that were produced last night because this is the		23	reviews a direct allocation with his client.	
24	first time I'm hearing of those.		24	I'm looking at Ms. Griswold in case she remembers it	
25	MR. NICHOLAS: Your Honor, I can speak to those first.		25	differently, but I think that's what he said.	

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1	So those were the two calls that we had between		1	situations in which counsel just sat around with a client and	
2	Thursday and today with those lawyers.		2	talked about it some more and decided that something less wordy	
3	THE COURT: Okay. Then let's start with more basic		3	was better.	
4	principles.		4	I guess I'd really like to know if there's someone at	
5	What is the position of your office regarding the		5	your table who had a conversation with Mr. Majidi's counsel	
6	propriety of the office speaking with defense counsel about		6	about Mr. Majidi's allocution that in any way impacted the	
7	proposed allocutions?		7	substance of that allocution.	
8	MR. NICHOLAS: Your Honor, I think that's routine.		8	(Continued on next page)	
9	Speaking with the defense -- to be clear, I don't know that		9		
10	it's routine to request a draft allocution.		10		
11	That's not something -- I don't think I have ever		11		
12	requested a draft allocution. I'm not saying there would be		12		
13	anything improper about that at all. To be clear, I do not		13		
14	think there would be anything improper about that.		14		
15	But in terms of speaking about an allocution, as		15		
16	your Honor knows from presiding over many plea allocutions, it		16		
17	often happens that in court, the parties confer right before		17		
18	someone allocutes. That is routine. There is absolutely		18		
19	nothing improper at all about attorneys discussing what would		19		
20	be an appropriate allocution.		20		
21	There are many legitimate considerations that would go		21		
22	into that -- making sure that an allocution hits the elements,		22		
23	making sure that an allocution is factually accurate. There is		23		
24	nothing improper about that in the office's view, and I think		24		
25	it's frequent.		25		
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1	THE COURT: You would agree, would you not -- let's		1	MR. NICHOLAS: Let me just take one moment, your	
2	focus first on Mr. Majidi's allocution.		2	Honor.	
3	You would agree it is quite different from the		3	MS. GRISWOLD: Yes, your Honor. I think -- I handled	
4	proposed allocution.		4	Mr. Dinucci's plea and Mr. Naftalis handled Mr. Majidi's plea,	
5	Yes, sir?		5	so just so we're precise, I think we should address this	
6	MR. NICHOLAS: Yes. I agree that it's different.		6	question with your Honor, respectively. If you want to start	
7	Yes. Yes. Agreed.		7	with Mr. Majidi, I think it's Mr. Naftalis.	
8	THE COURT: Do you know how it got to be different,		8	THE COURT: Please do, because that's what I have my	
9	sir?		9	notes on first. Thank you.	
10	MR. NICHOLAS: I don't specifically know how it got to		10	Mr. Naftalis? Do you have a memory, sir?	
11	be different. No. I would not be privy to -- I certainly		11	MR. NAFTALIS: Your Honor, I don't have a specific	
12	wouldn't be privy to a conversation between Mr. Majidi's		12	memory. I remember receiving the -- just to go back, the	
13	counsel and Mr. Majidi about the final allocution.		13	practice among the defense bar is they often say, we're going	
14	I'm quite confident that the allocution that he gave		14	to send these to you. We don't ask for them. Just to be	
15	in court is consistent with proffer notes that far precede the		15	clear.	
16	allocution. So I think that this notion that's been kind of		16	THE COURT: You did not ask for it in this case.	
17	floated -- I think the word used in Mr. Ruzumna's motion was		17	MR. NAFTALIS: No. I decidedly did not ask for it. I	
18	"impeded the truth-seeking function," and I thought I heard in		18	think oftentimes in cooperator pleas, and in regular pleas,	
19	his remarks today "obstruction of justice."		19	defense lawyers ask if we will review it, and we say, you're	
20	THE COURT: And witness tampering.		20	welcome to send it to us, but we're not asking you to.	
21	MR. NICHOLAS: And I know the Court does not like		21	THE COURT: That's fine. There was a request. Was	
22	adverbs. I take extreme umbrage at throwing those terms at us.		22	that perhaps from Mr. Dinucci's allocution?	
23	I think it was inappropriate.		23	MS. GRISWOLD: Yes, your Honor. I did request a	
24	THE COURT: Sir, can you please help me understand how		24	draft.	
25	a proposed allocution became a final allocution. I can see		25	THE COURT: Then let's focus on Mr. Majidi.	



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<div>1 So Mr. Naftalis, do you have a recollection one way or</div> <div>2 the other as to whether Mr. Majidi's counsel offered to send</div> <div>3 you the proposed allocution?</div> <div>4 MR. NAFTALIS: My rec -- I don't have a specific</div> <div>5 recollection, but it's not my practice to request them from</div> <div>6 defense lawyers.</div> <div>7 THE COURT: Okay. But assuming it were to arrive or</div> <div>8 assuming defense counsel were to say, would you like to see it,</div> <div>9 your practice would be to say, you can send it to me, I'm not</div> <div>10 requesting it?</div> <div>11 MR. NAFTALIS: Correct.</div> <div>12 THE COURT: Okay. Somehow it ended up with you, yes?</div> <div>13 MR. NAFTALIS: Yes.</div> <div>14 THE COURT: When it ended up with you, did you review</div> <div>15 it?</div> <div>16 MR. NAFTALIS: Yes.</div> <div>17 THE COURT: Did you speak again with counsel about it</div> <div>18 before the actual plea proceeding?</div> <div>19 MR. NAFTALIS: I know I spoke to them. I can't tell</div> <div>20 you when. I certainly never spoke to Mr. Majidi.</div> <div>21 THE COURT: Okay. That's fine. But let me make sure</div> <div>22 I understand what you recall. You recall receiving the</div> <div>23 allocution.</div> <div>24 MR. NAFTALIS: Yeah. I recall receiving it and before</div> <div>25 the plea, yes.</div>	<div>1 We just typically say, you're a cooperator, you're going to be</div> <div>2 under oath, allocute to the elements, you're not testifying to</div> <div>3 the judge, this isn't your opportunity to blame others or, you</div> <div>4 know, this isn't your sentencing proceeding, for example. It's</div> <div>5 just allocute. Again, I don't think there's anything improper</div> <div>6 about that, and it's typical, as your Honor knows, in plea</div> <div>7 allocutions with cooperators, that they're very basic, same for</div> <div>8 regular defendants, which is, just hit the elements. And</div> <div>9 that's my recollection. That's my general advice to lawyers.</div> <div>10 I certainly do not tell people what to say.</div> <div>11 THE COURT: That's what I want to hear.</div> <div>12 So right now as you're talking to me, it's fair to say</div> <div>13 you don't have a specific recollection of the communication</div> <div>14 with Mr. Rosenberg, is that correct?</div> <div>15 MR. NAFTALIS: Correct. But my general practice,</div> <div>16 whenever I get one of these, is, listen, you've written this,</div> <div>17 just hit the elements. My job is not to tell your client what</div> <div>18 to say. We've debriefed him. Your job is to allocute to what</div> <div>19 happened, meaning to the elements.</div> <div>20 THE COURT: No. Thank you. I know. If Mr. Majidi</div> <div>21 had read into the record what was sent as a proposed</div> <div>22 allocution, would you have cared?</div> <div>23 MR. NAFTALIS: No. I think it will be consistent with</div> <div>24 his testimony. I mean --</div> <div>25 THE COURT: I want to make sure you heard what I said.</div>		
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<div>1 THE COURT: And I want to be clear. I'm</div> <div>2 distinguishing you affirmatively recalling from you not</div> <div>3 disputing that you got it. You actually affirmatively recall</div> <div>4 receiving it.</div> <div>5 MR. NAFTALIS: Yes.</div> <div>6 THE COURT: Thank you.</div> <div>7 All right. You recall having one or more</div> <div>8 communications with Mr. Rosenberg prior to the actual plea</div> <div>9 proceeding?</div> <div>10 MR. NAFTALIS: My recollection is we spoke on the</div> <div>11 phone. I can't tell you -- I don't have it in front of me, but</div> <div>12 say it came the day before the plea. I think we spoke the day</div> <div>13 before, but I can't tell you when in the passage of time.</div> <div>14 THE COURT: All right. And do you recall at all the</div> <div>15 substance of your communication?</div> <div>16 MR. NAFTALIS: I don't recall the substance -- I don't</div> <div>17 recall the specifics. The substance was, which is what I say</div> <div>18 to all defense lawyers, which is, you've given us an</div> <div>19 allocution; we're only asking you allocute to the elements and</div> <div>20 what's in the information, and that -- to be clear, I don't</div> <div>21 think there's any great change in these allocutions, which is</div> <div>22 they allocute to the crime, and what they allocute to is</div> <div>23 consistent with what they told us, and what they propose in</div> <div>24 their proposed allocutions is also consistent to what they told</div> <div>25 us, meaning it's in our notes. Both of them are in our notes.</div>	<div>1 MR. NAFTALIS: Would I care? No.</div> <div>2 THE COURT: Okay. You're telling me, you're</div> <div>3 representing to me as an officer of the court that in no way</div> <div>4 did you seek to shape or modify the allocution.</div> <div>5 MR. NAFTALIS: Correct. I don't remember exactly what</div> <div>6 I said, but I would never suggest to a defense lawyer, this is</div> <div>7 what he should say or not say.</div> <div>8 THE COURT: Both of your co-counsel want to speak with</div> <div>9 you.</div> <div>10 MR. NAFTALIS: My colleagues are pointing out, by</div> <div>11 "shape," I mean to do something improper. The direction would</div> <div>12 be consistent with what the person said in the proffers.</div> <div>13 That's -- I don't --</div> <div>14 THE COURT: I don't actually understand what you just</div> <div>15 said, so let's back up, please.</div> <div>16 You've said to me that it is your practice to have the</div> <div>17 cooperator hit the elements, is that correct?</div> <div>18 MR. NAFTALIS: Correct.</div> <div>19 THE COURT: Are you saying that you would never give</div> <div>20 more specific direction than that?</div> <div>21 MR. NAFTALIS: I mean, if something is factually</div> <div>22 wrong, I don't want someone allocuting that's wrong. But I</div> <div>23 don't have a specific recollection of shaping this one. I</div> <div>24 don't like the word "shape," but --</div> <div>25 THE COURT: Okay. Then let's not use the term</div>		

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1 "shape." Did you, or did anyone from the government, ask  
2 Mr. Majidi's counsel to change the names of anyone in the  
3 allocation?  
4 MR. NAFTALIS: No.  
5 THE COURT: Did you ask him to change the date?  
6 MR. NAFTALIS: Not that I can -- I don't even recall.  
7 I'd have to look at the redline. My recollection --  
8 THE COURT: Please do.  
9 MR. NAFTALIS: My recollection -- I can tell you my  
10 one recollection is the proposed allocation -- I'm confusing  
11 them. I'm looking at the Dinucci one.  
12 THE COURT: Then please don't do that. Please think  
13 of -- go ahead. Look at the redline.  
14 MR. NAFTALIS: There is no change in date. There is  
15 no change in the date of Mr. Majidi. The only change is that  
16 it's shorter, and as opposed to summarizing what -- I'm looking  
17 at this.  
18 THE COURT: Yes, of course.  
19 MR. NAFTALIS: I don't see any additions or  
20 subtractions.  
21 THE COURT: I do. The addition I'm seeing is Mr. Shor  
22 is not named in the first iteration and he is named in this  
23 one. Now perhaps your argument is that he's lumped in with  
24 certain traders or someone else that are mentioned in the  
25 proposed allocation. That is the change that I identified.

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1 MR. NAFTALIS: Just to be clear, his name was in the  
2 information, so this isn't like -- this isn't new to anybody.  
3 I don't recall saying, make sure you allocute to -- you didn't  
4 include Shor in the first draft, put him in when you do it in  
5 court. I don't recall that.  
6 THE COURT: All right. Is there anything else you can  
7 tell me about your conversation with Mr. Rosenberg a day or so  
8 prior to the actual guilty plea proceeding?  
9 MR. NAFTALIS: No, other than I think that it was  
10 appropriate, and again, I --  
11 THE COURT: I have you more as a fact witness, sir.  
12 MR. NAFTALIS: Yes.  
13 THE COURT: I think I have --  
14 MR. NAFTALIS: The accusations that are getting lobbed  
15 in, I take personally and seriously, and the suggestion is  
16 offensive that we are suborning perjury in some way. The man  
17 proffered, Mr. Majidi, with me for months. We spent months  
18 talking about Jeremy Shor was literally the guy who got the  
19 corrupt marks every single time. And the suggestion that we  
20 were suborning perjury because Mr. Majidi allocuted to its  
21 information is like -- I can't even like believe that it's  
22 being lobbed in, but it is what it is. I certainly did nothing  
23 to improperly shape testimony -- to shape his allocation. So  
24 again, I would urge defense counsel to choose their words,  
25 because some of this stuff is getting a little insane.

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1 THE COURT: All right. I don't agree with last  
2 adjective.  
3 Sir, on the day of the plea proceeding, did you have a  
4 conversation with Mr. Rosenberg regarding the allocation?  
5 MR. NAFTALIS: No.  
6 THE COURT: Did you receive a revised allocation?  
7 MR. NAFTALIS: No. And I think you can tell -- by the  
8 way, as your Honor will recall, when we took the plea, there  
9 was a pause.  
10 THE COURT: Yes, because --  
11 MR. NAFTALIS: And I was -- so --  
12 THE COURT: Yes, and in fact, it wasn't one of my  
13 finer moments as a person taking pleas. I had to ask questions  
14 about the wire, and thank you for proffering about that. I do  
15 remember that part of it.  
16 All right. And then thereafter, there were no  
17 communications about the allocation, am I correct, that you can  
18 recall?  
19 MR. NAFTALIS: You mean after he actually pled guilty?  
20 THE COURT: Yes.  
21 MR. NAFTALIS: No.  
22 THE COURT: Okay. All right. Thank you.  
23 Ms. Griswold.  
24 MS. GRISWOLD: Yes, your Honor.  
25 So I handled the plea for Mr. Dinucci. I hadn't

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1 recalled, prior to last week, one way or the other about the  
2 issue of whether we requested or discussed an allocation.  
3 After the issue with Mr. Majidi was raised, I went back through  
4 my emails and found an email from Mr. Zinman saying -- actually  
5 an email from me before that asking if he had a draft  
6 allocation, and then the email where he provided one. It has  
7 been my practice, not necessarily in every case, but to ask for  
8 draft allocations so that the pleas can go smoothly, and when I  
9 say that, I mean so that the allocutions can be accurate and  
10 consistent with what I understand the facts of the case to be  
11 from the proffers.  
12 In this case the next recollection I have is that -- I  
13 don't know if it was a phone call or in Judge Hellerstein's  
14 courtroom. I can pull up an exchange with Mr. Zinman, which I  
15 will recount, but I believe it was in the courtroom.  
16 THE COURT: Just one moment, please.  
17 After you made a request, you received something in  
18 response to the request.  
19 MS. GRISWOLD: Yes.  
20 THE COURT: You reviewed the something that you  
21 received at or about the time of its receipt.  
22 MS. GRISWOLD: I don't have an independent  
23 recollection of doing so, but yes, I reviewed it in advance of  
24 the plea.  
25 THE COURT: You did not have communications with

<p>J6a1ahu7 Page 774</p> <p>1 Mr. Zinman prior to the plea proceeding?</p> <p>2 MS. GRISWOLD: That is my best recollection. I</p> <p>3 remember discussing -- and I believe it was in Judge</p> <p>4 Hellerstein's courtroom when we actually discussed some of the</p> <p>5 allocution. What I'm saying is that, is it possible that that</p> <p>6 conversation was on a phone call? It's possible. I think it</p> <p>7 was in the courtroom.</p> <p>8 THE COURT: All right. But the next recollection that</p> <p>9 you have regarding these plea proceedings is in fact in the</p> <p>10 courtroom, in Judge Hellerstein's courtroom.</p> <p>11 MS. GRISWOLD: Yes, your Honor.</p> <p>12 THE COURT: This is prior to the plea?</p> <p>13 MS. GRISWOLD: Yes, your Honor.</p> <p>14 THE COURT: All right. And tell me what happened,</p> <p>15 please.</p> <p>16 MS. GRISWOLD: So I do recall -- and I have the</p> <p>17 redline of the allocution as delivered versus the allocution in</p> <p>18 draft form. I do recall having a conversation with Mr. Zinman</p> <p>19 about the reference to the time period with respect to when he</p> <p>20 was asked, he being Mr. Dinucci, to provide improper marks. I</p> <p>21 remember specifically noting that the proposed allocution had</p> <p>22 2015 and that it was my recollection that the statements by</p> <p>23 Mr. Dinucci during our proffer sessions had put that time</p> <p>24 period into 2014.</p> <p>25 I'm also looking -- and I went back to look at this,</p>	<p>J6a1ahu7 Page 776</p> <p>1 Mr. Zinman regarding the opening date, the beginning date of</p> <p>2 the charged conspiracy, and you communicated to him your belief</p> <p>3 that Mr. Dinucci's proffers would place that at 2014. After</p> <p>4 you said that to him, is it your recollection that he had a</p> <p>5 meeting with his client or that he immediately said to you,</p> <p>6 you're right, or do you not recall?</p> <p>7 MS. GRISWOLD: I don't recall. I do believe -- recall</p> <p>8 him conferring with his client at some point in the proceeding.</p> <p>9 I don't recall whether it was at that moment. I believe that</p> <p>10 he conferred with his client after I had that conversation with</p> <p>11 him. I had no direct communication with his client. And then</p> <p>12 his client's allocution was 2014, so I believe that it has to</p> <p>13 be that he had a communication with his client.</p> <p>14 THE COURT: And I understand that. My question is:</p> <p>15 Did he speak to you before Judge Hellerstein took the bench and</p> <p>16 took the guilty plea?</p> <p>17 MS. GRISWOLD: Yes. I believe this was -- this</p> <p>18 happened before the plea was taken. Am I not understanding</p> <p>19 your question?</p> <p>20 THE COURT: I'm not asking the best questions I could.</p> <p>21 The conversation you just recounted about you telling</p> <p>22 him about 2014, clearly that was before the plea proceeding.</p> <p>23 He then conferred with his client. Did he tell you, prior to</p> <p>24 the plea proceeding beginning, that his client agreed with you</p> <p>25 or that he agreed with you that 2014 was the proper date, the</p>
<p>J6a1ahu7 Page 775</p> <p>1 that that is consistent with our proffer notes. On July 20th</p> <p>2 of 2017, on page 4 of 9 of a 302, we have a note: "During late</p> <p>3 2014 and early 2015, an understanding existed between PPI and</p> <p>4 Dinucci. PPI understood Dinucci was willing to mark bonds</p> <p>5 where PPI wanted bonds marked."</p> <p>6 So I do recall asking Mr. Zinman about the time frame</p> <p>7 and to confer about whether or not 2014 was a more accurate</p> <p>8 date for when his understanding of the request for the improper</p> <p>9 marks was made. And I did not have any direct communications</p> <p>10 with Mr. Dinucci. This was more than two years ago, so I don't</p> <p>11 remember -- I don't think it was -- I don't know whether he</p> <p>12 went out in the hallway or it happened in the courtroom. But</p> <p>13 that is what I remember. I do remember pointing out the time</p> <p>14 period and saying, I think the accurate starting point is 2014</p> <p>15 and I ask you to consider that.</p> <p>16 THE COURT: And did he come back and say we've</p> <p>17 considered it, or did you have a conversation with Mr. Zinman</p> <p>18 prior to the actual plea proceeding taking place?</p> <p>19 MS. GRISWOLD: I don't believe so. I believe it was</p> <p>20 in Judge Hellerstein's courtroom. I pause because I don't</p> <p>21 remember. It's possible that I had a phone call with him</p> <p>22 before. I'm remembering one interaction with him.</p> <p>23 THE COURT: I'm asking an imprecise question. I will</p> <p>24 ask a more precise question.</p> <p>25 You've just recounted a conversation that you had with</p>	<p>J6a1ahu7 Page 777</p> <p>1 correct date?</p> <p>2 MS. GRISWOLD: I don't have a recollection one way or</p> <p>3 the other. Based on all the facts I recounted, I would infer</p> <p>4 yes, that I got an answer that he either agreed or disagreed</p> <p>5 with me, but I don't remember at the plea, and as an officer of</p> <p>6 the court, I'm trying to be absolutely as precise as I can.</p> <p>7 THE COURT: Of course.</p> <p>8 MS. GRISWOLD: I can't pull that up in my mind.</p> <p>9 THE COURT: All right. Anything else that you can</p> <p>10 recall about the proceeding?</p> <p>11 MS. GRISWOLD: No, your Honor.</p> <p>12 THE COURT: If he had said to you that he disagreed</p> <p>13 and that the proper date was 2015, what would you have done?</p> <p>14 MS. GRISWOLD: Obviously I would absolutely want</p> <p>15 Mr. Dinucci to make statements to the Court that he believed</p> <p>16 were accurate, so if his counsel said to me that he could not,</p> <p>17 you know -- he disagreed with me on that fact, I would not have</p> <p>18 resisted.</p> <p>19 THE COURT: Other than your reference to Mr. Zinman</p> <p>20 about the date of the conspiracy, do you recall any other</p> <p>21 communications with Mr. Zinman about the substance of the</p> <p>22 allocution?</p> <p>23 MS. GRISWOLD: No. That's what I recall.</p> <p>24 THE COURT: In any way, to the best of your</p> <p>25 recollection, did you otherwise edit this allocution?</p>

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<p>1 MS. GRISWOLD: Not that I recall.</p> <p>2 THE COURT: All right. Mr. Nicholas, do you want to</p> <p>3 return to telling me why I should not be concerned and why I</p> <p>4 should not do what counsel is asking me to do.</p> <p>5 MR. NICHOLAS: Yes, your Honor.</p> <p>6 So I think counsel asked -- just going off</p> <p>7 Mr. Ruzumna's letter, counsel asked for a couple different</p> <p>8 things. I think one was an adverse inference instruction. So</p> <p>9 I don't think that such an instruction will be appropriate.</p> <p>10 It's an extreme remedy. I think Judge Scheindlin referred</p> <p>11 to -- this is a Latin phrase, which I may get wrong, but -- its</p> <p>12 in terrorem effect. I think that's from Zubulake. I'm sorry</p> <p>13 about my Latin. And I think Judge Scheindlin went on to say</p> <p>14 it's obviously extremely powerful, and I think she was</p> <p>15 discussing it in the context -- and a lot of the cases that I</p> <p>16 looked at over the weekend, or last night, I guess, discuss it</p> <p>17 in the context of actual spoliation.</p> <p>18 Here, the defense, defense counsel actually has the</p> <p>19 drafts, so the evidence has not been destroyed. I disagree</p> <p>20 that it has evidentiary value in terms of the proceeding, but</p> <p>21 even tabling that, it's not like we -- it's not like they will</p> <p>22 never have the opportunity to see the draft allocutions for</p> <p>23 Mr. Dinucci and Mr. Majidi. They have them. They have them in</p> <p>24 advance of either witness testifying. In Mr. Dinucci's case,</p> <p>25 there's no chance he even gets on this week. And even in</p>	<p>1 sure I understand what you're saying. Are you suggesting that</p> <p>2 defense counsel for either defendant should be permitted to</p> <p>3 inquire of the particular witness, be it Mr. Majidi or</p> <p>4 Mr. Dinucci, what it is they intended to say in the proposed</p> <p>5 allocation?</p> <p>6 MR. NICHOLAS: No, your Honor.</p> <p>7 THE COURT: Okay. I want you to be very clear.</p> <p>8 MR. NICHOLAS: No. I appreciate the opportunity to</p> <p>9 clarify. What I mean is that if in reading -- so let's take</p> <p>10 Mr. Dinucci as an example. The date range is wider in the plea</p> <p>11 before Judge Hellerstein than it was in the draft allocation.</p> <p>12 So it may be the case that Mr. Ruzumna sees the draft and</p> <p>13 thinks, you know what, like, I'm going to press this guy on</p> <p>14 when the conspiracy that he's talking about actually started.</p> <p>15 But I do not think it would be appropriate for him to invoke</p> <p>16 the allocation and say, isn't it a fact that your lawyer sent</p> <p>17 to Ms. Griswold a draft in which the date was later? Among</p> <p>18 other things, that communication came from the lawyer, but</p> <p>19 also, that would implicate like a flood of proffer notes that</p> <p>20 precede the actual allocation.</p> <p>21 So to kind of put a point on this, I don't think that</p> <p>22 defense counsel wants, and we're not seeking to introduce, a</p> <p>23 bevy of proffer notes into the record with a bunch of -- there</p> <p>24 may be occasions in this trial where it's appropriate to</p> <p>25 introduce prior consistent statements, but I don't think that</p>		
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<p>1 Mr. Majidi's case, he may not get on.</p> <p>2 So we're not in a spoliation world, but I don't</p> <p>3 think -- I think an adverse inference would be gratuitous and</p> <p>4 extremely prejudicial to the government in this context.</p> <p>5 THE COURT: Okay.</p> <p>6 MR. NICHOLAS: With respect to -- sorry, your Honor.</p> <p>7 I'm just looking at my notes.</p> <p>8 THE COURT: Please do.</p> <p>9 MR. NICHOLAS: Your Honor, with respect to the use, I</p> <p>10 think the other bucket was kind of the use of the draft</p> <p>11 allocutions at trial. So, Judge, here's what I would offer</p> <p>12 about that. If, in reading the draft allocation -- the</p> <p>13 extremely able counsel is going to cross-examine these</p> <p>14 witnesses. They have another data point for preparing their</p> <p>15 cross in terms of the draft allocutions. If, in reading Amin</p> <p>16 Majidi's draft allocation, Mr. Ruzumna thinks, I now have a</p> <p>17 good faith basis to ask a question that I wouldn't have</p> <p>18 otherwise thought to ask or a point that I'm going to press</p> <p>19 that I wouldn't have thought of without seeing this, obviously</p> <p>20 he has the benefit of the draft allocation. And there's</p> <p>21 nothing, you know -- if he has a good faith basis to ask the</p> <p>22 questions, then he can ask the questions, of course, on cross.</p> <p>23 But I don't think that the draft itself has any evidentiary</p> <p>24 place in the trial.</p> <p>25 THE COURT: Sir, let me stop you, please, so I can be</p>	<p>1 that should be coming up here. But if a draft allocation sent</p> <p>2 by a lawyer is left hanging out there, I think that would</p> <p>3 implicate a truckload of prior consistent statements that are</p> <p>4 consistent with the actual plea and that are more accurate than</p> <p>5 the draft. So I think this goes down a long rabbit hole, or</p> <p>6 maybe I mix metaphors. But I think the Court knows what I</p> <p>7 mean. There would be an issue if the plea that was given</p> <p>8 before the Court, or before Judge Hellerstein, or this Court</p> <p>9 were inconsistent with statements made by the witness to the</p> <p>10 government in proffer sessions. That would obviously be</p> <p>11 fertile ground for cross-examination. But the fact that a</p> <p>12 draft allocation sent by a lawyer was not as fulsome as prior</p> <p>13 proffers, to me, that is so far afield from having evidentiary</p> <p>14 value. It's so often the case -- put aside just cooperating</p> <p>15 witnesses. It's so often the case that a defendant of any kind</p> <p>16 does not, in his or her plea allocation, specify everything</p> <p>17 that happened in the crime or gives a more specific date range</p> <p>18 or only mentions one person instead of two people. I mean,</p> <p>19 most pleas are not as complete as a PSR. And to start going</p> <p>20 down this -- I mean, to start going down this road of every</p> <p>21 time there is any sort of communication between the government</p> <p>22 and the defense lawyer or the fact that a draft allocation sent</p> <p>23 by a lawyer is not the same as the actual sworn plea,</p> <p>24 independent of whether the sworn plea is consistent with</p> <p>25 proffer statements, I think is kind of a bottomless well.</p>		



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1 THE COURT: I'm trying to see how many metaphors		1 statement a moment ago, included the clause "other than the	
2 you're going to get into this discussion, sir.		2 evidence," so, I mean, if the question is, did the	
3 MR. NICHOLAS: I'm sorry, Judge.		3 government -- it would be improper, of course, for the	
4 THE COURT: That's fine, sir.		4 government to ask for an alteration to an allocution that is	
5 Mr. Nicholas, when Mr. Majidi testifies, can I imagine		5 not founded in the evidence. That would be totally improper.	
6 that Mr. Rosenberg will be here?		6 There's no way that's what happened here. I don't think it	
7 MR. NICHOLAS: Judge, I don't know the answer to that.		7 would be improper, though, and therefore I don't know if there	
8 I think that I -- it's my understanding that one of his counsel		8 needs to be inquiry about whether there was a conversation	
9 is planning to be here for the majority of the testimony. I		9 about the proffer, about the allocution encompassing the	
10 don't know that it would be Mr. Rosenberg. He has two lawyers,		10 evidence.	
11 two partners.		11 THE COURT: Okay. All right. Let me try it a	
12 THE COURT: Yes. But if I asked.		12 different way, please, sir.	
13 MR. NICHOLAS: I have every reason to believe he would		13 Your colleagues have strong but not entirely complete	
14 comply, and we can certainly ask him to.		14 recollections of those communications. Would you agree with	
15 THE COURT: And would there be any government		15 that?	
16 objection to my inquiring of Mr. Rosenberg about efforts, or		16 MR. NICHOLAS: Yes.	
17 not, of the government to shape, to use the discussion		17 THE COURT: They don't remember every moment.	
18 Mr. Naftalis and I were having, the plea allocution?		18 MR. NICHOLAS: Yes.	
19 MR. NICHOLAS: Your Honor, obviously I wouldn't and		19 THE COURT: Right. Is there any reason to inquire, or	
20 couldn't get in the way of the Court doing that.		20 not to inquire, of the other side of those conversations?	
21 THE COURT: I'm just asking if you object, sir, and		21 MR. NICHOLAS: Your Honor, my hesitation is just --	
22 tell me why.		22 I'm not trying to be difficult.	
23 MR. NICHOLAS: Well, your Honor, to the extent that it		23 THE COURT: No.	
24 may implicate conversations that Mr. Rosenberg had with		24 MR. NICHOLAS: I just -- it's not something that I've	
25 Mr. Majidi in terms of what to say, I think there would be a		25 had the experience with before and so I'm, you know, I guess	
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1 privilege issue.		1 loath to start -- to agree in any categorical way, because I	
2 THE COURT: I appreciate exactly what you're saying,		2 don't, that every conversation that the government has with a	
3 and that's why what I was asking you was: If I had discussions		3 defense lawyer, or a lawyer of a cooperating witness,	
4 with Mr. Rosenberg about whether he felt that he was being		4 implicates Giglio. I take it the Court's inquiry is narrower,	
5 asked by the government to alter a proposed allocution for		5 and I appreciate that. I just want to make sure that I'm clear	
6 reasons other than the evidence, do you have any objection to		6 about that.	
7 that?		7 THE COURT: Of course. And you should not read into	
8 MR. NICHOLAS: I just want to make sure I understand		8 my questions a decision. I'm exploring the issue. And I	
9 the question, because it's important.		9 wanted to understand your thoughts.	
10 THE COURT: Okay. Well, here, let me try it again,		10 MR. NICHOLAS: Yes, your Honor.	
11 sir, okay? Your colleagues, Mr. Naftalis and Ms. Griswold,		11 THE COURT: Okay. Check with your colleagues. Is	
12 have gotten up and told me their recollection of their		12 there anything else you want to say?	
13 communications with Mr. Zinman and with Mr. Rosenberg. You		13 MR. NICHOLAS: Just one moment, your Honor.	
14 remember that, sir, yes?		14 THE COURT: Thank you.	
15 MR. NICHOLAS: Yes, I do.		15 MR. NICHOLAS: Your Honor, I have nothing to add. And	
16 THE COURT: Is there any reason why I couldn't inquire		16 again, to be clear, whatever the Court wants us to do, we will	
17 of the other party to that conversation whether they have the		17 do. I just wanted to get my position out there.	
18 same recollection?		18 THE COURT: Of course. You believe it sets an	
19 MR. NICHOLAS: The short answer is no. But I just		19 unfortunate precedent.	
20 want to add, the way the Court -- the word the Court used was		20 MR. NICHOLAS: I think it could.	
21 "alter." I do not think there would be anything improper about		21 THE COURT: Okay.	
22 the government getting a draft allocution and saying to a		22 MR. NICHOLAS: It could.	
23 lawyer, didn't he proffer to a longer time period, or didn't		23 THE COURT: I understand.	
24 he -- hasn't he said a hundred times that he committed the		24 Mr. Ruzumna, I'll hear from you in reply.	
25 crime with person X? Now I think the Court, in the Court's		25 MR. RUZUMNA: Your Honor, just a few points, and I'll	

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<p>1 make this brief.</p> <p>2 I believe a plea allocution is different in kind than</p> <p>3 a normal conversation that a defense lawyer may have with the</p> <p>4 government. This is the culmination of a cooperating witness's</p> <p>5 investigation and cooperation, or at least initial stage of the</p> <p>6 cooperation, so I think that this is of much greater magnitude</p> <p>7 than a normal conversation.</p> <p>8 I respect what Mr. Nicholas says that not every</p> <p>9 communication is going to have to be scoured up and down for</p> <p>10 any, you know, potential thought, but when you're talking about</p> <p>11 a plea allocution, and it really goes to all conversations, if</p> <p>12 there's Brady or Giglio information that's provided, it has to</p> <p>13 be turned over, particularly in this context.</p> <p>14 THE COURT: Counsel, do you have reason to doubt the</p> <p>15 representations made to me by the prosecutors who were involved</p> <p>16 in the two conversations?</p> <p>17 MR. RUZUMNA: No.</p> <p>18 THE COURT: All right.</p> <p>19 MR. RUZUMNA: And I want to get to that in a moment.</p> <p>20 The statements by a lawyer for a witness, or for his</p> <p>21 or her client, are not always -- can be admissions for that</p> <p>22 particular client. The lawyer is the agent. Particularly in</p> <p>23 this case where we know Mr. Zinman's practice is to review a</p> <p>24 statement with a witness before sending it to the government</p> <p>25 for a plea allocution, I think that draft is the witness,</p>	<p>1 the introduction of a prior consistent statement, unless that</p> <p>2 prior consistent statement was made before there was a motive</p> <p>3 to lie. These proffer statements by these witnesses cannot</p> <p>4 come in as prior consistent statements because at that point</p> <p>5 the witness did have a reason to provide the government with</p> <p>6 evidence that that witness would think would help with his</p> <p>7 cooperation.</p> <p>8 Lastly, your Honor, I want to make clear, as your</p> <p>9 Honor asked me very directly, I'm not suggesting that these</p> <p>10 lawyers are trying to manipulate the evidence with false</p> <p>11 information. I'm sure that they believe the changes that were</p> <p>12 made in these allocutions are accurate. They go beyond just</p> <p>13 cleaning it up to do the elements. They include my client's</p> <p>14 name. Sometimes they take out relevant statements about</p> <p>15 Mr. Majidi. It goes beyond just cleaning them up or minimizing</p> <p>16 them. It does more than that. I'm not suggesting that these</p> <p>17 folks were lying, or suborning perjury. Those words never came</p> <p>18 out of my mouth. What I did say is, if a defense lawyer had</p> <p>19 done some of these things and didn't turn over that evidence</p> <p>20 when it was called for, there would be a real questioning of</p> <p>21 the conduct. Here, it may be perfectly acceptable. Maybe it</p> <p>22 is purely that when a defense lawyer suggests that a proposed</p> <p>23 allocution, these lawyers said, hey, I think your dates are</p> <p>24 wrong, go back and check, whatever else. If it was adopted by</p> <p>25 the witness, it's still a statement by that witness. We still</p>		
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<p>1 Mr. Dinucci's, statement. I think he adopted it, and the fact</p> <p>2 Mr. Nicholas said that there may be proffer statements that are</p> <p>3 inconsistent with it -- maybe he used a different time frame on</p> <p>4 another date -- it doesn't mean that that is not a statement of</p> <p>5 the witness. It doesn't become a statement because it's</p> <p>6 consistent; it doesn't become a statement because it's</p> <p>7 inconsistent. If the witness, Mr. Dinucci, in that one</p> <p>8 particular instance, adopts a statement and it gets sent to the</p> <p>9 government, that's his statement. Even if it is later changed.</p> <p>10 I don't suggest that Ms. Griswold was trying to manipulate it</p> <p>11 in a way that she thought was untrue, but it doesn't matter,</p> <p>12 because that draft allocution, that proposed allocution, if</p> <p>13 Mr. Zinman's practice held up, is Mr. Dinucci's statement. We</p> <p>14 should be allowed to use it in the cross-examination. Not</p> <p>15 just, oh, that's interesting, there is a date 2015, maybe that</p> <p>16 will lead me to inquire about it. I can ask him about his</p> <p>17 statement if he offers a prior -- I'm sorry -- if he offers any</p> <p>18 testimony that's inconsistent with that statement. So just</p> <p>19 like any other statement by Mr. Dinucci, I can use his draft</p> <p>20 allocution as a prior inconsistent statement. I can use it to</p> <p>21 refresh recollection. That is, in my mind, very, very clear.</p> <p>22 And going to that same point, this idea that if the</p> <p>23 defense wants to use these proposed allocutions, it would</p> <p>24 somehow open up the door to all the proffer notes of these</p> <p>25 witnesses, that's not true. Using a statement does not allow</p>	<p>1 can use it for the appropriate purposes a witness statement can</p> <p>2 be used for. But those things have to be turned over. This is</p> <p>3 Brady. This is Giglio. It has to be turned over. It can't</p> <p>4 be, well, there was a mistake in it so we don't need to turn it</p> <p>5 over because the final is good enough. That's not how Brady</p> <p>6 and Giglio work. That's where I'm getting at, your Honor.</p> <p>7 And what I do resent is, every time we call out</p> <p>8 something that, as your Honor noted, these things should have</p> <p>9 been turned over, and I do think it's consequential and I do</p> <p>10 think if the shoe had been on the other foot, there would have</p> <p>11 been a lot of grief that we would have suffered, and they're</p> <p>12 suffering grief now, so I'm not suggesting otherwise. But I</p> <p>13 don't like to be the bad guy. I don't like to be the one, I</p> <p>14 can't believe someone's accusing me of suborning perjury. I'm</p> <p>15 not accusing anyone of suborning perjury. I'm saying this is a</p> <p>16 big deal and I have a client to represent, and these things</p> <p>17 have to be looked into. We're entitled to certain relief, and</p> <p>18 I've laid out what I think that is. And I don't want to be</p> <p>19 called to the carpet for being the bad guy and doing all these</p> <p>20 things every time we say we should have gotten something.</p> <p>21 So thank you, your Honor.</p> <p>22 THE COURT: All right. I don't recall calling you to</p> <p>23 the carpet, sir.</p> <p>24 MR. RUZUMNA: You didn't.</p> <p>25 THE COURT: All right. Thank you.</p>		

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1 Mr. Finzi, do you want to be heard, or does someone  
 2 from your table want to be heard on this, or you're just saying  
 3 you agree with all of Mr. Ruzumna's arguments?  
 4 MR. FINZI: I agree with --  
 5 THE COURT: I'm sorry. I can't hear you, sir.  
 6 MR. FINZI: I agree with all of Mr. Ruzumna's  
 7 arguments. And I'll be very, very brief, and I actually mean  
 8 it this time, because I'm tired.  
 9 The point here, Judge, at least from where we sit, is  
 10 that if there had not been communications between the  
 11 government and defense counsel, the allocutions delivered would  
 12 have been different, and they would have been different in a  
 13 way that benefited us. It would have been sworn statements,  
 14 admissible before this jury as prior statements made under  
 15 oath, to a certain extent, at least -- and I don't expect us to  
 16 agree on this with the government, but to a certain extent, at  
 17 least, inconsistent in material ways with the allocution that  
 18 was actually delivered. So however it happened here, we have  
 19 been deprived of -- or events have transpired such that our  
 20 cross-examination of these government witnesses are not as -- I  
 21 hate to say effective because that makes it seem like it's  
 22 tactical, but are not based on the words they originally  
 23 intended to utter.  
 24 THE COURT: All right. Thank you.  
 25 I was looking at the rules of evidence this morning.

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1 I want to look again at the prior consistent and prior  
 2 inconsistent statements. You will either get a written order  
 3 from me tonight or something first thing tomorrow. It's not  
 4 going to come up tomorrow morning. We apparently have a lot of  
 5 other things to do. But can I see the parties at 8:45  
 6 tomorrow.  
 7 That's a yes. Terrific.  
 8 MR. FINZI: Yes.  
 9 THE COURT: Anything else to address?  
 10 That's a no. Great.  
 11 MS. GRISWOLD: No.  
 12 THE COURT: Go forth. I'll see you tomorrow. Thank  
 13 you very much.  
 14 THE DEPUTY CLERK: All rise.  
 15 (Adjourned to June 11, 2019, at 8:45 a.m.)  
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